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4 UNITED STATES BANKRUPTCY COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6 In re

7 NAPA VALLEY PHYSICIANS PLAN,

No. 01-10255

8 Debtor(s).  
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10 JEFFRY G. LOCKE, Trustee,

11 Plaintiff(s),

12 v.

A.P. No. 02-1174

13 JEFF HUNT,

14 Defendant(s).  
15 \_\_\_\_\_/

16 Memorandum on Ordinary Course of Business Defense  
17 \_\_\_\_\_

18 Although trial of this adversary proceeding has been delayed, one issue is ripe for summary  
19 determination: defendant's assertion that the trustee must prove, as an element of an avoidance action  
20 under § 549(a) of the Bankruptcy Code, that the transfer was not in the ordinary course of business.

21 The relevant facts are undisputed. On the eve of the debtor's Chapter 11 filing, defendant  
22 received four checks on account of prepetition invoices. These checks cleared the debtor's bank account  
23 postpetition.

24 Section 549(a) provides, in pertinent part, that a trustee may avoid a transfer that occurs after the  
25 commencement of the case and is not authorized by the Bankruptcy Code. Defendant's argument is that  
26 pursuant to § 363(c)(1) a debtor in business may use property of the estate in the ordinary course of

1 business. Therefore, the transfer was authorized by the Bankruptcy Code and is not avoidable under §  
2 549(a).

3 The flaw in defendant's argument is that § 363 is not interpreted so as to allow a Chapter 11  
4 debtor to pay prepetition debt; it authorizes a debtor to use postpetition funds to pay postpetition debt,  
5 but not prepetition debt. The payment of a prepetition debt by a trustee or debtor in possession is *ipso*  
6 *facto* out of the ordinary course of business. See *In re Interco Systems, Inc.*, 202 B.R. 188, 191-92  
7 (Bkrcty.W.D.N.Y. 1996)(§ 549 does not contain an ordinary course of business exception; postpetition  
8 payment is protected from avoidance only as to postpetition obligations). See also 5 Collier on  
9 Bankruptcy (15<sup>th</sup> ed. Rev.), ¶ 549.03[1]("Examples of postpetition transfers not authorized by the  
10 Bankruptcy Code or the bankruptcy court which are recoverable by the trustee include payments to  
11 prepetition creditors . . ."). The sole case cited by defendant in support of his position, *In re Dant &*  
12 *Russell, Inc.*, 853 F.2d 700 (9<sup>th</sup> Cir. 1988), dealt with postpetition obligations.

13 For the foregoing reasons, it shall be deemed without controversy in this adversary proceeding  
14 that the trustee does not need to prove that a payment was not in the ordinary course of business in order  
15 to avoid a transfer under § 549(a) of the Bankruptcy Code.

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19 Dated: March 20, 2003

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Alan Jaroslovsky  
U.S. Bankruptcy Judge